

**Appl. No.: 09/643,073**  
**Amdt. dated August 23, 2005**  
**Reply to Office action of June 9, 2005**

**Amendments to the Drawings:**

The attached sheets of drawings replace the informal drawings previously submitted.

Attachment: Replacement Sheets

## REMARKS

### Claim Status

Claims 1-22 remain pending. Claim 3 has been amended to address an antecedent basis concern, but the scope of the claim is unchanged.

### Rejections Under 35 USC § 112

Claims 3-9 and 13-19 stand rejected under 35 USC § 112, 2<sup>nd</sup> paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. More specifically, these claims stand rejected “as being incomplete for omitting [an] essential functional relationship”. OA item 8. Applicants respectfully traverse this rejection. Such a rejection is appropriate in only limited circumstances that are not present in this case.

The second paragraph of MPEP § 2172.01 summarizes the basis for such a rejection: “[A] claim which fails to interrelate essential elements of the invention as defined by applicant(s) in the specification may be rejected under 35 U.S.C. 112, second paragraph, for failure to point out and distinctly claim the invention.” The key phrase in the foregoing quote is “essential elements ... as defined by applicants”. As stated by the introductory paragraph to section § 2172, “A rejection based on the failure to satisfy [the subject matter] requirement is appropriate only where applicant has stated ... that the invention is something different from what is defined by the claims.” The examiner has not identified such a statement by applicants, nor are applicants aware of any such statement. Accordingly, this rejection must be withdrawn.

Applicants further wish to direct the examiner’s attention to the remainder of the second paragraph of MPEP § 2172.01, which emphasizes that absent some clear statement by the applicants, **functional interrelationships are not necessary to patentability**. “[S]ee *Ex parte Nolden*, 149 USPQ 378, 380 (Bd. Pat. App. 1965) (“[I]t is not essential to a patentable combination that there be interdependency between the elements of the claimed device or that all the elements operate concurrently toward the desired result”); *Ex parte Huber*, 148 USPQ 447, 448-49 (Bd. Pat. App. 1965) (A claim does not necessarily fail to comply with 35 U.S.C. 112, second paragraph where the various elements do not function simultaneously, are not directly functionally related, do not directly intercooperate, and/or serve independent purposes.).”

The examiner further rejected claim 3 as being unclear for lacking proper antecedent basis for “a net order count for the first port stored in a processor”. As noted by MPEP § 2173.05(e), “A claim is indefinite when it contains words or phrases whose meaning is unclear. ... [However, if] the scope of a claim would be reasonably ascertainable by those skilled in the art, then the claim is not indefinite. *Ex parte Porter*, 25 USPQ2d 1144, 1145 (Bd. Pat. App. & Inter. 1992)”. Applicants note that the quoted claim limitation has a reasonably ascertainable scope, and accordingly, is not indefinite under 35 USC § 112.

The examiner further rejected claim 3 as being unclear for lacking proper antecedent basis for “the net number of orders”. Applicants have accordingly amended the claim to recite “a net number of orders”.

The examiner further asserted that “a net order count for the first port must be determined and stored (in a processor) before the decrementing step is carried out”. Even if this assertion were assumed to be true, applicants assert that the scope of the claimed method invention is determined by the recited steps, not by what one may determine to be a necessary preliminary step. Stated another way, the claims are a template that will be used for determining infringement, not a blueprint for implementing an invention embodiment.

The examiner further rejected claim 5 as being unclear for lacking proper antecedent basis for “an acknowledgement count for the first port stored in a processor”. As noted previously, the test for clarity is whether the scope is reasonably ascertainable by those skilled in the art. Because the quoted phrase has reasonable ascertainable scope, the antecedent basis objection is unfounded, and this rejection should be withdrawn.

The examiner further asserted that “an acknowledgement count for the first port must be determined and stored (in a processor)” before said incrementing. Again, applicants maintain that the scope of the claim is determined by the recited limitations. Though preliminary steps may be required before the recited steps can occur, such steps are not part of the invention.

The examiner further rejected claim 6 as lacking antecedent basis for “an order count for the first port ...”. As noted previously, the test is whether the claim scope is reasonably ascertainable by those skilled in the art. Because the quoted phrase has reasonable ascertainable scope, the antecedent basis objection is unfounded, and this rejection should be withdrawn.

The examiner rejected claims 7-9 and 13-19 as having similar deficiencies to those already noted. Applicants traverse these rejections for the reasons already noted.

**Rejections Under 35 USC § 103**

Claims 1, 2, 7, 9, 11, 12, 17, 19, 21-22 stand rejected under 35 USC § 103(a) as being unpatentable over U.S. Patent No. 6,667,975 ("DeJagger"). Applicants respectfully traverse because the cited art fails to teach or suggest all of the claim elements.

Independent claim 1 recites "receiving through said first port from said market to which the first port is coupled an acknowledgment of said first order". Independent claim 11 recites a similar limitation. The examiner asserts that this limitation is inherently disclosed by DeJagger at 2:49-55, which states "load balancing ... is ... dynamic, that is, packets from a given stream may be forwarded on different ports depending on each port's current utilization." Applicants first note that the courts have ruled that "[t]o establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference ... [It] may not be established by probabilities or possibilities.'" *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999). Given this standard for inherency, applicants maintain that the quoted claim limitation is clearly *not* inherent in DeJagger because dynamic load balancing can be achieved in ways that do not necessitate receiving order acknowledgements. Indeed, DeJagger teaches a load balancing method that is based on transmit queue depth rather than orders and acknowledgements. *See* DeJagger 5:2-5 and 7:20-57. For at least this reason, independent claims 1 and 11, along with their dependent claims, are allowable over the cited art.

Dependent claim 2 recites "determining that a latency for the first port is less than a maximum allowed latency for the first port". Dependent claim 12 recites a similar limitation. The examiner cites DeJagger 3:9-15 and 3:39+ as teaching this limitation. However, the cited portions relate only to minimum time intervals between stream reassignments between ports. That is, the time intervals discussed relate to a minimum time interval between redeterminations of an appropriate outgoing port for a given stream ID. DeJagger's disclosures simply fail to teach or suggest determining a port latency and comparing it to a maximum allowed latency for that port. For at least this additional reason, dependent claims 2 and 12 are allowable over the cited art.

**Allowable Subject Matter**

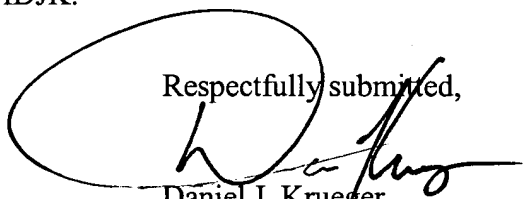
Applicants acknowledge the examiner's indication of allowable subject matter in claims 10 and 20. Applicants will reserve amendment of these claims into independent form pending the prosecution outcome on the base claims.

**Conclusion**

In view of the foregoing remarks, applicants respectfully request allowance of the pending claims. The examiner is encouraged to contact the undersigned with any questions or concerns regarding this matter.

In the course of the foregoing discussions, applicant may have at times referred to claim limitations in shorthand fashion, or may have focused on a particular claim element. This discussion should not be interpreted to mean that the other limitations can be ignored or dismissed. The claims must be viewed as a whole, and each limitation of the claims must be considered when determining the patentability of the claims. Moreover, it should be understood that there may be other distinctions between the claims and the prior art which have yet to be raised, but which may be raised in the future. If any fees are inadvertently omitted or if any additional fees are required or have been overpaid, please appropriately charge or credit those fees to Conley Rose, P.C. Deposit Account Number 03-2769/1991-01600/HDJK.

Respectfully submitted,



Daniel J. Krueger  
Reg. No. 42,771  
Attorney for Applicants  
Conley Rose, P.C.  
P.O. Box 3267  
Houston, Texas 77253-3267  
Ph: (713) 238-8000